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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 22

MORRIS STEINER, HARRY LIGHTMAN, MITCHELL MAGID, AND B. B. STEINER, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS CUMBERLAND BATTERY MANUFACTURING COMPANY, AND CUMBERLAND BATTERY MANUFACTURING COMPANY, A PARTNERSHIP, PETITIONERS

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR

OPINIONS BELOW

The opinion of the district court (R. 218-222) is reported at 111 F. Supp. 546. The opinion of the court of appeals (R. 265-272) appears at 215 F. 2d 171.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 10, 1954. A petition for rehearing was denied without opinion on September 17, 1954 (R. 273). The petition for a writ of certiorari was filed on December 2, 1954, and was granted on April 25, 1955 (R. 273). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910 (29 U.S.C. 201 *et seq.*), and of the Portal-to-Portal Act of 1947, c. 52, 61 Stat. 84 (29 U.S.C. 251 *et seq.*), are set forth in the appendix to the Government's brief in *Mitchell* v. *King Packing Co.*, No. 39 (to be argued with this case).

QUESTION PRESENTED

Where workers in a battery plant must make extensive use of dangerously caustic and toxic materials and are compelled by circumstances, including vital considerations of health and hygiene, to change clothes and to shower in facilities which State law requires their employer to provide, are these "principal," rather than "preliminary" or "postliminary," activities within the meaning of the Portal-to-Portal Act, so that they must be counted in measuring the work-time for which compensation is required by the Fair Labor Standards Act?

STATEMENT

The Secretary of Labor brought this action to enjoin petitioners from violating the overtime and record-keeping requirements of Sections 7 and 11 (c) of the Fair Labor Standards Act of 1938, as amended, in the employment of production workers, and from violating Section 15(a)(4) of the Act by making interstate shipments of the goods produced by such workers.

Petitioners own and operate a plant located in Nashville, Tennessee, where they are engaged in manufacturing automotive-type wet storage batteries which they sell in interstate commerce. All of the company's production employees customarily work with or near the various chemicals used in the plant (fdg. 4, R. 213). These include lead metal, lead oxide, lead sulphate, lead peroxide, and sulphuric acid (*ibid.*). Some of these are in liquid form, some are in powder form, and some are solid (R. 102, 103, 118, 154, 181-183). In the manufacturing process some of the materials go through various changes (R. 26) and give off dangerous fumes (R. 47-48, 60, 70, 98-99, 126-127). Some are spilled or dropped and thus become a part of the dust in the air (R. 27, 71, 108, 117, 154). In general, the chemicals permeate the entire plant and everything and everyone in it (R. 26, 238).

Lead and lead compounds are toxic to human beings (fdg. 6, R. 214). Thus, regular exposure to atmosphere containing as much as 1.5 milligrams of lead per ten cubic meters is regarded by the medical profession as hazardous and involving the possibility of lead intoxication or lead poisoning (*ibid.*).

In battery plants, it is "almost impossible" to keep lead concentration in the air "within absolutely safe limits" (fdg. 7, R. 214). In petitioners' plant, "lead oxide was on the floor and in the air and on the plates which employees handled" (dist. ct. op., R. 221). Moreover, "abnormal concentrations of lead have been discovered in the bodies of some of [petitioners'] employees and [petitioners'] insurance doctor has recommended that such employees be segregated from their customary duties" (fdg. 14, R. 216; see also R. 206).

The primary ways in which lead poisoning is contracted are by inhalation and ingestion (R. 48, 60, 61; 237), *i.e.*, by taking in particles through the nose or mouth, an open cut or sore, or any other body cavity (R. 238-239).[1] The risk is "very great" (dist. ct. op., R. 220) and even exists outside the plant because the lead dust and lead fumes, which are prevalent in the plant, attach themselves to the skin, clothing, and hair of the employees (*ibid.*; RR. 246-249). Even the families of battery workers may be placed in some danger if lead particles are brought home in the workers' clothing or shoes (R. 248-249).

Sulphuric acid in the plant is also a hazard. It is irritating to the skin and can cause severe burns (fdg. 5, R. 213-214; dist. ct. op., R. 220). When the acid contacts clothing, it causes disintegration or rapid deterioration (dist. ct. op., R. 220; R. 52-53). Moreover, the effects of sulphuric acid make the employee more susceptible than he would other-

[1] While lead may also be absorbed through the skin, the danger of becoming poisoned in this manner is slight (R. 48).

wise be to contamination by particles of lead and lead compounds (fdg. 5, R. 213-214).

Battery manufacturers, including petitioners, try to minimize hazards by plant ventilation, but industrial and medical experts are in agreement that ventilation alone is not sufficient to avoid the dangers of lead poisoning (dist. ct. op., R. 220). Safe operation also requires the removal of clothing and showering at the end of the work period (*ibid.*; also, R. 50-52, 243-245, 258-261). Accordingly, in order to make their plant as safe a place to work as is possible under the circumstances and thereby increase the efficiency of its operation, petitioners have equipped it with shower facilities and a locker room with separate lockers for work and street clothing. Also, they furnish without charge old but clean work clothes which the employees wear (R. 175). Employees regularly change into work clothes before the beginning of the productive work period and shower and change back into street clothes at the end of that period (R. 10, 33-34). All of the production employees who testified stated that they changed their clothes at the beginning and end of the productive work period, and, with a single exception,[2] that they showered or washed before leaving the plant (R. 30-31, 72, 81, 94-95, 105, 119, 128, 146, 156-157).

Although petitioners have not issued written instructions requiring their employees to change clothes and use the shower facilities that have

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[2] The exception is an employee who has a wounded foot and is fearful of an infection if he uses a common shower. This employee therefore bathes at his home, "about five blocks" from the plant (R. 145-146).

been made available to them, various employees testified that the plant foreman had instructed them that they "all had to take a bath" (R. 105, 123, 138, 149), and that "he told the whole shop" to do this (R. 111, 132), "on account of lead" (R. 143). A signed statement of the foreman (R. 163) declared, "In the afternoon the men are required by the company to take a bath because lead oxide might be absorbed into the bloodstream. It protects the company and the employee both." See also R. 168-169, 172.

The changing of clothes is especially needed by those who work with sulphuric acid, because the acid eats wearing apparel. It is, of course, possible for the employees to work in their own clothes; but, as one of them testified, if he did, he "might go home naked" (R. 130). Furthermore, the cost of providing their own work clothing would be prohibitive for the employees (R. 131, 136, 139), since the acid causes such rapid deterioration that the clothing sometimes lasts only a few days (R. 36, 72, 92, 97, 104, 152, 158).

The changing of clothes and showering are a "recognized part of industrial hygiene programs" in the storage battery industry (fdg. 8, R. 214). Moreover, a Tennessee statute requires that—

> * * * every employer shall provide adequate and sanitary shower facilities when the workers are exposed to excessive heat, or to skin contamination with infectious, irritating, or toxic materials. [Tennessee Code Ann. (Williams, 1934), 1952 Supp.; Sec. 5788.15.] [Fdg. 9, R. 214.]

In addition, the Tennessee Workmen's Compensation Act (Tennessee Code Ann. (Williams, 1934), 1952 Supp., Secs. 6851-6901), which covers petitioners, makes lead poisoning a compensable occupational disease (Section 6852 (d)). In order to comply with this statute, petitioners carry insurance, under Section 6895, to protect against liability (fdg. 10, R. 214-215). Their insurance carrier would not accept the insurance risk if defendants refused to provide showering and clothes-changing facilities for their employees" (fdg. 12, R. 215; R. 65).

Petitioners concededly do not record or pay for the time which their employees spend in clothes-changing and showering, which was found to amount to thirty minutes a day (ten minutes in the morning and twenty minutes in the afternoon) for each employee (R. 221). Holding that these activities "are made necessary by the nature of the work performed," that they fulfill mutual obligations" between petitioners and their employees, that they "directly benefit" petitioners in the operation of their business, and that they "are so closely related to other duties performed by [petitioners'] employees as to be an integral part thereof and are, therefore, included among the principal activities of said employees," the trial court concluded that the time thereby consumed is not excluded from coverage by Section 4 of the Portal-to-Portal Act, but constitutes time worked within the meaning of the Fair Labor Standards Act (conclusions of law 3 and 4, R. 216-217). The court of appeals affirmed, likewise holding that the term "principal activity or activities" in Section

4 embraces "all activities which are an integral and indispensable part of a principal activity" (R. 272) and that the activities in question fall within this category.

INTRODUCTION AND SUMMARY

Petitioners do not challenge the concurrent finding of the courts below that the clothes-changing and showering activities of the battery plant employees (men who work with or near dangerously toxic materials) are indispensable to the performance of productive work and integrally related thereto. See Pet. Br., p. 33. Basically, it is petitioners' position that activities of this description fall outside the concept of "principal activity" (Portal-to-Portal Act, Section 4(a)(2)) and beyond the protection of the Fair Labor Standards Act if they are performed off the production line and before or after regular shift hours. This contention raises the same issues involved in *Mitchell* v. *King Packing Co.*, No. 39 (to be argued with this case).

In the Government's brief in No. 39, we develop at some length the following three propositions:

(1) Under the Portal-to-Portal Act's criteria relating to future (post-1947) liability, activities performed off shift are compensable if they fall within the scope of the employee's "principal activity or activities."

(2) The legislative history establishes the purpose of Congress to require compensation for activities which are an integral part of the employee's principal work, whether such activities are performed before, during, or after the scheduled workday.

(3) The 1949 Amendments to the Fair Labor Standards Act confirm the conclusion that Section 4 of the Portal-to-Portal Act did not exclude from coverage all activities performed outside the hours spent on the production line.

In the instant brief, we do not repeat, *in extenso*, the arguments in support of these propositions but briefly restate them with a view to emphasizing their particular application to the established facts and circumstances of the case at bar. We emphasize particularly that the sponsors of the Portal-to-Portal Act expressed their intention to cover clothes changing and showering when, as in the case of chemical plant employees, such activities are indispensable to productive work. We also point out, in response to petitioners' contentions concerning Section 3(o), added in 1949, that this section, which deals in terms with clothes changing and showering, is necessarily premised upon the assumption that such activities may fall within the scope of the employee's principal activity.

ARGUMENT

Changing of Clothes and Taking of Shower Baths to Guard Against the Serious Occupational Hazards Inherent in the Production of Storage Batteries Are Functions Integrally and Indispensably Related to the Employees' Productive Work. They Accordingly Constitute "Principal Activities", Within the Meaning of the Portal-to-Portal Act, Compensable Under the Fair Labor Standards Act.

The thrust of petitioners' argument is that under the Portal-to-Portal Act only work on the production line should be considered a "principal

activity" and that other activity, even though functionally or indispensably related to the productive process, is to be deemed embraced by the terms "preliminary" and "postliminary." Their view of the statute is based on the erroneous assumption that Section 4 (dealing with *future* compensation rights and the one involved here) has the same legislative sweep and meaning as Section 2 (dealing with *past* compensation rights) (Br., pp. 15-16). The interpretation at which they arrive is inconsistent with the language of the Portal-to-Portal Act and plainly contradicted by the legislative history of that Act, as well as by the content of subsequent amendments to the Fair Labor Standards Act.

Criteria under the Portal-to-Portal Act:—The Portal-to-Portal Act was adopted in 1947 primarily to meet an "existing emergency" resulting from claims which, if allowed, would have created "wholly unexpected liabilities, immense in amount and retrospective in operation." Sec. 1(a)(b), 29 U.S.C. 251 (a)(b). However, a sharp distinction must be drawn between the broad exclusionary standard adopted in relation to suits for back pay for alleged pre-Portal-to-Portal Act violations (Sec. 2) and the discrete, more liberal set of criteria governing future (*i.e.*, post-enactment) rights of compensation (Sec. 4).

The "preliminary" or "postliminary" activities excluded from future coverage by Section 4 are only those which fall outside the scope of the employee's "principal activity or activities." Thus, it is not decisive, as petitioners urge, that an employee activity is one required to be performed

outside of regular shift hours. If that had been the purpose of Congress, it would have been a simple matter to say so. That Congress chose, instead, to exclude only that which comes before or after the commencement or termination of the employee's principal activities gives strong indication, on the face of the statute, that the lawmakers were well aware that in many instances employees might be required to perform, before or after regular hours, work for which they should be compensated.

In striking contrast, it should be noted, Congress provided in Section 2, relating to liability for back (pre-1947) pay, that the employer would not be liable "on account of *any* activity" unless its compensability had been fixed by contract or established custom.

Other provisions of the Portal-to-Portal Act similarly show that Congress, in dealing with the declared "existing emergency," did not propose to alter drastically or permanently the future operation of the Fair Labor Standards Act. Note Section 3 and compare it with Section 11; note also Sections 9 and 10. And see the Government's brief in No. 39, pp. 12-13.

It is thus plain from the scheme and structure of the Portal-to-Portal Act that the broad exclusionary standard adopted in relation to past claims is not to be carried over in the adjudication of claims arising subsequent to that Act.

Legislative history:—The "key words" of Section 4 (93 Cong. Rec. 4389)—"principal activity or activities"—were deliberately chosen by Congress with a view to assuring compensation for all employee activities which are an integral part of

the job. The Senate Report accompanying the Portal-to-Portal Act (S. Rep. 48, 80th Cong., 1st Sess.) declared (p. 48) that "[t]he term 'principal activity or activities' includes all activities which are an integral part thereof * * *".[3] It was repeatedly emphasized by the sponsors of Section 4 "that in the use of the words 'principal activity' we have preserved to the employee the rights and the benefits and the privileges which have been given to him under the Fair Labor Standards Act, because it is our opinion that those activities which are so closely related and are an integral part of the principal activity, indispensable to its performance, must be included in the concept of principal activity" (93 Cong. Rec. 2297; see also pages 2298, 2300).

The legislative history makes clear that the terms "preliminary" and "postliminary" refer not to activities which are integrally or indispensably related to performance of productive work, but only to incidental activities similar in nature to the "walking, riding, or traveling" expressly mentioned in Section 4(a)(1)—checking in or out; waiting in line to receive pay checks; changing clothes or washing up as a matter of convenience. See S. Rep. No. 48, *supra*, p. 47. While, concededly, clothes changing and showering would ordinarily constitute "preliminary" or "postliminary" activities, the courts below correctly

[3] Though the Portal-to-Portal Act had its origin in a bill introduced by Congressman Gwynne, Section 4, the provision here involved, was added by the Senate. The original Gwynne bill contained no comparable section (H. Rep. 326, 80th Cong., 1st Sess., p. 12).

held that they may not be so classified automatically and under all circumstances as a matter of law. When, as in the instant case, the clothes changing and showering are vitally and closely related to the safe and effective performance of the employees' principal work, they are "an integral part" of "principal" activity within the letter and intent of Section 4.

One of the examples of "principal" activities specifically discussed in the debates was the clothes changing and showering which might be required of "chemical plant workers." In a colloquy between Senator Cooper, a sponsor of the measure, and Senator McGrath, the intent to cover these activities, when their performance is necessitated by the conditions of productive work, was made perfectly explicit (93 Cong. Rec. 2298):

> Mr. McGrath. There are innumerable instances of operations which have to be performed that are not covered in these two particular examples. I think of one at the moment. In certain of our chemical plants workers are required to put on special clothing and to take off their clothing at the end of the workday, and in some of the plants they are required to take shower baths before they leave. Does the Senator regard such activity as that as coming within the compensable workday?
>
> Mr. Cooper. I am very happy that the Senator has asked the question, because I believe it gives the opportunity of drawing a fine distinction between the type of activity which we consider compensable and the type which

should not be compensable. *In accordance with our intention as to the definition of "principal activity," if the employee could not perform his activity without putting on certain clothes, then the time used in changing into those clothes would be compensable as part of his principal activity.* On the other hand, if changing clothes were merely a convenience to the employee and not directly related to the specific work, it would not be considered a part of his principal activity, and it follows that such time would not be compensable. [Emphasis added.]

In short, while Section 2 was designed, as one Senator stated it, to wipe out pending portal-to-portal cases so far as "humanly possible," Section 4 aimed to guarantee the future compensability of all significant and productive work integrally related to the job. For further examples of work covered by the phrase "principal activity or activities," see the Government's brief in No. 39, pp. 14-19.

Senator Cooper's explanations of the terms used in Section 4 and his examples of compensable off-shift activities cannot be brushed aside as "casual statements" (Pet. Br., p. 22). As pointed out, *supra* (p. 12, note 3), although the Portal-to-Portal Act had its origin in a bill introduced by Representative Gwynne, Section 4 was added by the Senate. The original Gwynne bill contained no comparable section. Senator Cooper not only supported the legislation, as petitioners recognize (Br. p. 22), but he was a member of a three-man subcom-

mittee of the Committee on the Judiciary which conducted hearings on the measure (93 Cong. Rec. 2124) and formulated the Senate version (93 Cong. Rec. 2131, 2293). Senator Cooper, not Representative Gwynne, is the "sponsor" to whom "we [should] look [if] the meaning of the statutory words is in doubt." See *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-395.

It is true that Representative Gwynne stated, after Section 4 had been added by the Senate, that an employer could not be subjected to liability, in the absence of an agreement or custom, for activities preceding "the moment of employment," such as the laying out of clothing to be worked on by garment workers. Pet. Br., p. 23. But this very example appears in the Senate Report, *supra*, as a case in which compensation would be required. See the Government's brief in No. 39, p. 14. Here, again it is to be emphasized that the Senate subcommittee added Section 4, and that Representative Gwynne's original bill had no equivalent. To the extent that Representative Gwynne's statements suggest that the standards in Sections 2 and 4 are the same, they are refuted both by the statutory language and by the repeated statements of those who sponsored Section 4. See the Government's brief in No. 39, pp. 19-21.

Petitioners' battery plant fits precisely the chemical plant example which was used by Senator Cooper in explaining when clothes changing and showering would be an integral part of a principal activity. The manufacture of wet storage batteries involves the extensive use of chemicals and chemical compounds, including caustic sulphuric acid and

toxic lead and lead compounds. It is accomplished by dusty processes which make it almost impossible to control within absolutely safe limits the concentration of lead in the plant atmosphere. Safe operation requires the removal of work clothing and showering at the end of the working period. So important is it that battery plant employees change out of their work clothes and bathe at the end of the workday that the carrier of petitioners' workmen's compensation insurance would not assume the risk involved if the necessary facilities for these indispensable precautionary measures were not provided. The necessities of the situation are further attested by Tennessee's statutory requirement that employers in petitioners' classification furnish shower facilities for their employees. Thus, the concurrent finding that the clothes-changing and bathing activities of petitioners' employees are "an integral and indispensable part" of the production of batteries (R. 272) was not only warranted but compelled.[4]

The 1949 Amendments.—As the courts below expressly recognized, the Fair Labor Standards Amendments of 1949 confirm the view that the Portal-to-Portal Act does not automatically exclude from coverage all activities performed out-

[4] The indispensability of clothes changing and bathing in a battery plant is also demonstrated by *Steiner* v. *Spencer*, 24 Tenn. App. 389, 145 S. W. 2d 547, a workmen's compensation case involving petitioners' plant. It is to be noted that one of the defenses raised by these petitioners in that case was that the employee was guilty of contributory negligence in that he was "careless about washing the lead dust from his body" at the end of the workday (24 Tenn. App. at 396; 145 S. W. 2d at 552).

side the hours spent on the production line. Thus, new Section 3(o) provided that in computing hours of employment "there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee." The exclusion, in certain defined circumstances, of clothes-changing and showering activities demonstrates that, in other circumstances, these activities may meet the test of compensability. To suggest otherwise is to suppose that Congress enacted a useless and meaningless provision in Section 3(o).

Petitioners would have the courts construe Section 3(o) as indicating that clothes changing and showering are invariably within the statutory terms "preliminary" and "postliminary" but that, nevertheless, these activities "*may be included* as compensable time by custom or practice at the establishment" (Pet. Br., p. 32). To change the unambiguous statutory words "shall be excluded" to petitioners' words "may be included" is not to construe the statute but to rewrite it—and to rewrite it by going 180 degrees around the circle.

Moreover, such "construction" would make nonsense of the statutory scheme. That scheme may be recapitulated as follows:

(1) The Fair Labor Standards Act of 1938 undertakes to guarantee compensation for all work performed by the employee.

(2) The Portal-to-Portal Act of 1947, in

dealing with future liability of the employer, states in substance (Sec. 4(a)) that incidental, non-productive activity, not part of the employee's principal work, need not, as a matter of statute, be paid for (though such activity may, of course, be made subject to the requirement of compensation by voluntary act of the parties expressed in contract or established custom, Sec. 4(b)).

Section 3(o), added in 1949, declares that clothes changing and showering may be *excluded* from measured working time pursuant to a collective-bargaining agreement so providing.

As is evident, the only assumption upon which Section 3(o) serves a purpose is that there may be circumstances in which clothes changing and showering are compensable as a matter of statutory requirement. Certainly, there was no need, in 1949, to provide that employers and employees could agree to make clothes changing and showering compensable. The compensability of activities made compensable by contract had been fully confirmed, two years previously, by Section 4(b) of the Portal-to-Portal Act.[5]

---

[5] Of course, the extent to which activities, not otherwise compensable, are made so by contract depends upon the terms of the contract. Thus, Section 4(c) states:

> For the purposes of subsection (b), an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

The legislative history to which petitioners refer (Br., pp. 27-31) does not support their argument. The nub of the history appears in the following paragraphs (set forth in petitioners' brief at p. 28) from a statement by Representative Herter, sponsor of the provision which became Section 3(o):

> Let me be specific. In the bakery industry, for instance, which is 75 percent organized, there are collective-bargaining agreements with various unions in different sections of the country which define exactly what is to constitute a working day. In some of those collective-bargaining agreements the time taken to change clothes and to take on the clothes at the end of the day is considered a part of the working day. In other collective-bargaining agreements it is not so considered. But in either case the matter has been carefully threshed out between the employer and the employee and apparently both are completely satisfied with respect to their bargaining agreements.
>
> The difficulty, however, is that suddenly some representative of the Department of Labor may step into one of those industries and say, 'You have reached a collective-bargaining agreement which we do not approve. Hence the employer must pay for back years the time which everybody had considered was excluded as part of the working day.' That situation may arise at any moment. This amendment is offered merely to prevent such

a situation arising and to give sanctity once again to the collective-bargaining agreements as being a determining factor in finally adjudicating that type of arrangement. It sounds wordy, but in effect it is a very simple amendment.

It seems perfectly plain that Representative Herter meant to provide that clothes changing and showering might be *excluded* from statutory coverage by virtue of a collective-bargaining agreement, notwithstanding the fact that such activities might otherwise be deemed covered, in the particular circumstances, as being part of the employee's principal activity. His express aim was to afford employers and employees latitude to deal by contract with a situation which might otherwise lead to controversy. They already had authority to *include;* his bill gave authority to *exclude.* As stated earlier, the legislation presupposes that there may be circumstances in which clothes changing and showering would be compensable under Section 4.

In this light, the Government's position in the instant case is a simple one. Here, as found on the basis of compelling evidence, there were circumstances showing that clothes changing and showering are an integral and essential part of productive work; and, concededly, there is no collective bargaining agreement excluding them from the requirement of compensation.

Petitioners do not discuss Section 16(c) of the 1949 Amendments. That statutory provision, like

new Section 3(o), confirms the conclusion that the Portal-to-Portal Act does not automatically exclude from coverage all off-shift activities. Thus, Section 16(c) declares that existing administrative interpretations, not inconsistent with the Amendments, "shall remain in effect." Outstanding at the time was the Administrator's interpretation that certain "preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act. . . ." Among such activities the Administrator expressly included Senator Cooper's example of necessary clothes-changing and bathing activities in a chemical plant. See *General Statement as to the effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938*, p. 13 (29 C.F.R. 790, at 790.8, 12 F.R. 7655). This administrative interpretation was specifically brought to the attention of Congress in connection with proposed Section 3(o).[6] Congress made no change affecting this interpretation save for the limited exception from coverage written into Section 3(o)—an exception, as observed above, necessarily premised upon the view of the law expressed in the interpretation. The Administrator's interpretation, thus ratified by Congress, remained in force.

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[6] See letter of William A. Quinlan, General Counsel, Associated Retail Bakers of America, printed in Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 1st Sess., on S. 58, S. 67, S. 92, S. 105, S. 190, S. 248, and S. 653, p. 1173, at 1175-1179.

Section 16(c). See *Alstate Construction Co.* v. *Durkin*, 345 U. S. 13, 16-17; *Maneja* v. *Waialua Agricultural Co.*, 349 U. S. 254, 270.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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